No. 96-1037

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KIOWA TRIBE OF OKLAHOMA,
Petitioner,
v.
MANUFACTURING TECHNOLOGIES, INC.,
Respondent.

On Writ of Certiorari to the Court of Appeals, Division I, for the State of Oklahoma

BRIEF OF THE COW CREEK BAND OF UMPQUA TRIBE OF INDIANS, THE HOOPA VALLEY TRIBE, THE LAS VEGAS PAIUTE TRIBE, THE SPOKANE TRIBE OF INDIANS, THE CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA, THE WINNEBAGO TRIBE OF NEBRASKA, AND THE COLVILLE TRIBAL ENTERPRISE CORPORATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address the following question: Whether the sovereign immunity from suit accorded to Indian Tribes as a matter of federal law bars an action brought in state court to recover money damages for a breach of contract arising out of economic activity undertaken by the Tribe outside Indian country.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

CONSTITUTION, STATUTES, AND RULES

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

TABLE OF AUTHORITIES—Continued

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INTERESTS OF THE AMICI CURIAE

Amici are six federally recognized Indian tribes and the wholly owned enterprise of a seventh federally recognized Indian tribe that have a compelling interest in whether tribal sovereign immunity continues to bar actions arising out of economic development activities undertaken by tribes outside of Indian country.[1] An affirmation by

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

this Court of the decision of the Oklahoma Court of Appeals in *Manufacturing Technologies, Inc. v. Kiowa Tribe of Oklahoma*, Pet. App. 1, would significantly infringe on the sovereign rights enjoyed by *amici* and all other tribes.

Amici are the Cow Creek Band of Umpqua Tribe of Indians; the Hoopa Valley Tribe; the Las Vegas Paiute Tribe; the Spokane Tribe of Indians; the Central Council of Tlingit and Haida Indian Tribes of Alaska; the Winnebago Tribe of Nebraska; and the Colville Tribal Enterprise Corporation (a tribal corporation and governmental instrumentality of the Confederated Tribes of the Colville Reservation). *Amici* are engaged in a variety of enterprises both inside and outside Indian country and have significant economic relationships with non-Indian parties. Many of these relationships were structured with the understanding that, absent a clear waiver by the tribe or abrogation by Congress, tribal sovereign immunity would apply. Such an understanding merely reflects the well-established doctrine of this Court and the express policy of Congress to strengthen tribal governments, enhance tribal self-determination, and promote tribal economic self-sufficiency. *See* Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.* (1994); Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.* (1994); Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.* (1994); Tribal Self-Governance Act of 1994, 25 U.S.C. § 458aa *et seq.* (1994); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). If this Court permits the decision of the Oklahoma Court of Appeals to stand, it would cast doubt on these carefully constructed economic relationships in which tribal sovereign immunity was a freely negotiable term of the agreement.

The protection from suit afforded by tribal sovereign immunity is an important sovereignty right retained by the tribes and protected by the federal government. *Amici* are

gravely concerned over the attempt by the Oklahoma courts to rewrite long-standing legal precedent regarding the scope of tribal sovereign immunity and the plenary power of Congress over Indian affairs. *Amici* support the Kiowa Tribe in challenging the decision of the Oklahoma Court of Appeals.

STATEMENT OF THE CASE

A. Facts and Procedural History

The Kiowa Tribe of Oklahoma ("Kiowa" or "Tribe") is a federally recognized Indian tribal government. Treaties entered into between the Kiowa Nation of Indians and the United States between 1837 and 1867 effectively recognized the sovereignty of the Kiowa and established it, under the parlance of the time, as a domestic dependent nation involved in a trust relationship with the United States. *See* 15 Stat. 581, 589 (1867); 14 Stat. 717 (1865); 10 Stat. 1013 (1853); 7 Stat. 533 (1837); *see also Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (describing Indian tribes as "domestic dependent nations"); *see generally Lone Wolf v. Hitchcock*, 187 U.S. 553, 554-63 (1903) (describing history of relations between the Kiowa Nation and the United States). The Tribe currently has approximately 10,000 enrolled members and owns approximately 1,200 acres of land in Oklahoma, much of it in scattered parcels. In addition, the Tribe has an interest in approximately 3,000 acres of land held in trust by the United States. (Br. for United States as *Amicus Curiae* in Supp. of Pet. at 2 & n.1.) The Tribe operates its government under a Constitution and Bylaws adopted May 23, 1970. The annual budget approved by the tribal voters for 1996-1997 was $970,533.

This particular case is one of a series of five related suits against the Tribe by creditors with interlocking ownership interests.[2] These suits arose from the Tribe's

[2] The four other suits are *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct.

purchase of controlling interest in an Oklahoma business corporation called Clinton-Sherman Aviation, Inc. Clinton-Sherman Aviation had been engaged in aircraft repair and maintenance at the former Clinton-Sherman Air Force Base, an area outside of Indian country. *See Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59, 60 n.2 (Okla. 1995), *cert. denied*, —— U.S. ——, 116 S.Ct. 1675 (1996). On April 3, 1990, the chairman of the Tribe's unincorporated entity, the Kiowa Industrial Development Commission, signed a promissory note ("Note") on behalf of the Tribe promising to pay Manufacturing Technologies $285,000 plus interest in exchange for stock. *See* Note 1-2 (attached as Exh. A to Pet. on Prom. Note, filed Aug. 24, 1993 in the District Court of Oklahoma County, Oklahoma). No cash consideration was paid. (Pet. at 3.)

The record contains scant evidence regarding the nature of the investment: the Tribe and its attorneys relied exclusively on tribal sovereign immunity in defending against the suit. (Def.'s Mot. to Dismiss at 1; Br. in Supp. of Mot. to Dismiss at 2; Answer of Def. at 2; Aff. of Billy Evans Horse at 1; Def.'s Br. in Opp. to Pl.'s Mot. for Summ. J. at 2.) Prior cases and press reports, however, note the interlocking ownership of the creditors. Clinton-Sherman Aviation, Inc., was created by investors Robert M. Hoover, Jr., Gordon Pulliam, William P. Jennings and the Carl Gungoll Estate to provide aircraft maintenance services at the former Clinton-Sherman Air Force Base in Burns Flat, Oklahoma. *See* Mark A. Hutchison, "Burns Flat Firm Plans To Take Off," *The Sunday Oklahoman*, August 20, 1989, at 1, and Mark A. Hutchison, "All Systems Are Go at Burns Flat Aircraft Maintenance Firm," *The Daily Oklahoman*, January 22, 1990, at 7.

1675 (1996); *Aircraft Equip. Co. v. Kiowa Tribe of Oklahoma*, 921 P.2d 359 (Okla. 1996); *JBJ Invs., Inc. v. Kiowa Tribe of Oklahoma*, No. 87,032, Oklahoma Supreme Court (appeal pending); *Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Oklahoma*, No. 87,031, Oklahoma Supreme Court (appeal pending).

The investors apparently claimed that the maintenance facility would bring in huge revenues and 6,000 jobs in the next three to five years, all based largely on the expectation of federal contracts. *See The Sunday Oklahoman*, August 20, 1989, at 1.

The facts as described in *Hoover*, 909 P.2d at 60, show that Hoover, one of the founders of Clinton-Sherman Aviation, also obtained a promissory note from the Tribe on the same day as the transaction at issue here. The $142,500 note was secured by 5,000 shares of Clinton-Sherman Aviation stock. *See id.* When the Tribe defaulted, it turned the 5,000 shares over to Hoover, apparently without asserting its sovereign immunity. *See id.* Hoover then sold the shares at public auction to himself for a dollar. *See id.* at 60 & n.3. Hoover thus purchased a $142,000 cause of action for a single dollar. Gordon Pulliam, the President of Manufacturing Technologies, Respondent in this case, was also a shareholder in Clinton-Sherman Aviation. Yet another owner of Clinton-Sherman Aviation was apparently the beneficiary of a $200,000 note assumed by the Tribe in another related transaction.

The Note called for the Tribe to make full payment in two installments, 30 and 90 days after the Note was signed, at the Oklahoma City offices of Manufacturing Technologies. *See* Note at 1. The Tribe did not make either payment. (Pet. at 4.) Three years after the Tribe defaulted on the Note, Manufacturing Technologies sued the Tribe in Oklahoma state court seeking judgment on the Note. (Pet. on Prom. Note at 1.)

The Tribe moved to dismiss the suit on the grounds of tribal sovereign immunity from suits in state courts. (Pet. at 4; Def.'s Mot. to Dismiss at 1.) The Tribe relied on a provision in the Note that stated "[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." (Pet. at 4.) The trial court rejected the Tribe's argument and awarded Manufacturing Technologies $445,471 in damages. (Pet. at 4.)

B. Summary of the Decision of the Oklahoma Court of Appeals

In an unpublished opinion, the Oklahoma Court of Appeals affirmed the trial court's entry of summary judgment against the Tribe. *See* Pet. App. 1. The court conceded that the Note had preserved the Tribe's sovereign rights and described the issue on appeal as whether a state court has jurisdiction "to hear a claim and enter a judgment for damages against a federally recognized Indian tribe which has not waived its sovereign rights." *Id.* The court concluded that state civil jurisdiction did extend to the Tribe under the facts of this case. *See id.*

The court rejected the argument that tribal sovereign immunity protected the Tribe from suit in state court, relying on two recent Oklahoma Supreme Court decisions. In both *First Nat'l Bank in Altus v. Kiowa, Comanche and Apache Intertribal Land Use Comm.*, 913 P.2d 299, 300 (Okla. 1996), and *Hoover*, 909 P.2d at 62, the Oklahoma Supreme Court held that a contract executed outside of Indian country by an Indian tribe and a non-Indian was enforceable in state court. Given this current state of Oklahoma law, the appeals court here concluded there was "no doubt that the promissory note at issue may be enforced in state court, the doctrine of sovereign immunity notwithstanding," stating, "This Court will not presume to second guess the reasoning of our Supreme Court." Pet. App. 4.

The analysis of the Oklahoma Supreme Court in *First Nat'l Bank* and *Hoover* relied heavily on *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989). The court of appeals retraced the path to *Padilla* as well, Pet. App. 3, and ascribed to *Padilla* the conclusion that state courts may exercise jurisdiction over an Indian tribe engaged in off-reservation activities where state law permits similar actions against the state. *See id.* Accordingly, the appeals court held

that tribal sovereign immunity was inapplicable to off-reservation commercial tribal activity since Oklahoma permits breach of contract actions against the state, and since Congress had not expressly prohibited similar actions against tribes. *See id.* The court also opined that such litigation "does not infringe on tribal self-government." *Id.*

The Oklahoma Supreme Court declined discretionary review. This Court granted the petition for a writ of certiorari on June 27, 1997.

SUMMARY OF ARGUMENT

The decision of the Oklahoma Court of Appeals radically departs from precedent and subverts the constitutionally accorded plenary power of the United States Congress over Indian affairs.

This Court has repeatedly held that Congress and the tribes, not the States, define the limits of tribal sovereign immunity. According to long-standing precedent, absent a clear waiver by a tribe or abrogation by Congress, a tribe is immune from suit. Within these parameters, tribal sovereign immunity provides an absolute defense from suit. At no point has this Court conditioned tribal sovereign immunity on the location of the events giving rise to the dispute or suggested that tribal sovereign immunity would not extend to a tribe acting in a commercial capacity. Rather, this Court has repeatedly rejected attempts by states unilaterally to diminish the scope of tribal sovereign immunity along these lines.

Nevertheless, the Oklahoma courts have attempted to rewrite tribal sovereign immunity doctrine, borrowing liberally, and improperly, from state sovereign immunity jurisprudence to conclude that states have the option whether to recognize a federally protected sovereignty interest. The analogy drawn by the Oklahoma courts has no legal or historical basis and reflects a fundamental mis-

understanding of the nature of tribal sovereignty. Moreover, the cases upon which the Oklahoma courts rely for the proposition that a state may enforce its non-discriminatory laws against Indian tribes who engage in conduct that reaches outside Indian country have held only that a state may have the authority to tax or regulate these activities. Those decisions in fact confirm the continued vitality of tribal immunity.

Finally, the Oklahoma courts failed to consider significant federal and tribal interests that militate against a diminution in tribal sovereign immunity. Congress has repeatedly reaffirmed the goals of strengthening tribal governments, enhancing tribal self-determination, and promoting tribal economic self-sufficiency. The federal doctrines underlying tribal sovereign immunity encourage tribal governments to engage in economic activities which improve employment, health, education, and self-sufficiency in tribal communities. If political or economic needs dictate, tribes can freely decide to waive or limit their sovereign immunity, but otherwise sovereign immunity protects emerging tribal governments and tribal resources from potentially ruinous legal and financial liability.

Experience with sovereign immunity at the state and federal levels demonstrates that governments ultimately reform their immunity doctrines after achieving a requisite level of financial security. Today, most tribes confront the challenges faced by the infant federal and state governments early in the Nation's history. Sovereign tribes deserve the same opportunity to develop while protected by immunity, but if changes are to be made in the scope of that immunity, the task belongs to Congress, not a state court of appeals.

ARGUMENT

In determining to allow suits to proceed against tribes unless Congress expressly prohibits them, the Oklahoma courts have turned the doctrine of tribal sovereign immunity precisely backward. Congress has plenary power, subject only to other constitutional limits, to determine the nature and scope of tribal sovereignty. The proper question, therefore, is whether Congress has affirmatively withdrawn immunity from the tribe. Since it has not, the State is without power to dispense with tribal sovereign immunity. The decision of the Oklahoma Court of Appeals and the cases on which it rests subvert the law, allowing the State to do what only Congress may do lawfully. The end result is contrary to the Supremacy Clause, federal Indian law, and the right of tribes to self-determination, self-government, and sovereignty.

I. TRIBAL SOVEREIGN IMMUNITY PROTECTS THE TRIBE FROM SUIT

The court of appeals was bound by the decision of the Oklahoma Supreme Court in *Hoover*. That case confused state authority over individual Indians with state authority over Indian tribes. It confused the position of states in our federal system with the position of Indian tribes. It confused jurisdiction to consider a tribal sovereign immunity defense with the power to set aside tribal sovereign immunity altogether. As a result, it took a power that belongs to Congress—the power to define the extent of tribal sovereign immunity—and vested it in the State. Each of these errors should be corrected by this Court.

A. Congress, Not the States, Defines the Limits of Tribal Sovereign Immunity

Decisions of this Court have repeatedly held that Congress, and not the States, controls the limits of tribal sovereign immunity.

Based on the unique status of Indian tribes as domestic dependent nations, Congress has plenary power over the scope of tribal sovereign immunity, subject to other constitutional limitations. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 414-15 (1980). Only Congress or a tribe may abrogate or waive tribal sovereign immunity. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986). Accordingly, "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the states." *Three Affiliated Tribes*, 476 U.S. at 891. Tribes, like any other sovereign, may choose to consent to suit or may prospectively waive their sovereign immunity through statute or contract. *See, e.g., Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir.) (offering example of limited express waiver of tribal sovereign immunity), *cert. denied*, 510 U.S. 1019 (1993); *Namekagon Dev. Co. v. Bois Forte Reservation Hous. Auth.*, 517 F.2d 508, 510 (8th Cir. 1975) (finding limited express waiver of tribal sovereign immunity). Any waiver of sovereign immunity by a tribe or abrogation by Congress must be in clear and unmistakable language. *See Citizen Band Potawatomi*, 498 U.S. at 509 (1991); *Santa Clara Pueblo*, 436 U.S. at 58. Thus, federal law is the only outside power that can diminish tribal sovereignty. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 n.14 (1982).

In *Citizen Band Potawatomi*, 498 U.S. at 509, the Court reaffirmed that "[s]uits against Indian tribes are . . . barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation." This understanding reflects long-standing precedent. *See Blatchford v. Native*

Village of Noatak, 501 U.S. 775, 782 (1991) ("We have repeatedly held that Indian tribes enjoy immunity from suit by States."); *Three Affiliated Tribes*, 476 U.S. at 890-91 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance."); *Santa Clara Pueblo*, 436 U.S. at 58 ("Indian tribes have long been recognized as possessing the common law immunity from suit enjoyed by sovereign powers."). *See also Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 172 (1977); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940).

B. The Rationale of *Nevada v. Hall* Does Not Apply to Indian Tribes

The appeals court conceded that the Tribe did not waive its sovereign immunity in signing the Note. Nor has there been any suggestion that Congress has abrogated the Tribe's sovereign immunity in any respect. Nevertheless, the appeals court found the Note enforceable in state court notwithstanding the Tribe's claim of sovereign immunity. In reaching this conclusion, the appeals court relied heavily on the *Hoover* decision—a case arising out of the same transaction and also involving the Kiowa. To conclude that tribal sovereign immunity did not apply to the Kiowa transaction, the *Hoover* court adopted the reasoning employed by the New Mexico Supreme Court in a similar case. *See Hoover*, 909 P.2d at 61 (citing *Padilla*, 754 P.2d at 850-51).

In *Padilla*, the court reasoned that a forum state's decision to recognize tribal sovereign immunity from suit was no different than the decision to accord a sister state immunity from claims arising out of activity by the sister state in the forum state. *See* 754 P.2d at 850-51. Relying on *Nevada v. Hall*, 440 U.S. 410 (1979), the New Mexico Supreme Court determined that the decision to recognize another sovereign's immunity, be it a sister state or an

Indian tribe, was nothing more than a matter of comity. *See Padilla*, 754 P.2d at 850. The *Hoover* court concluded that, since Oklahoma permitted suits for breach of contract to proceed against the state and nothing other than comity prevented Oklahoma from refusing to recognize the immunity of another sovereign, state or tribe, a contract executed between an Indian tribe and a non-Indian outside of Indian country is enforceable in state court. *See Hoover*, 909 P.2d at 62. Such reasoning, however, is ill-founded and ignores the unique position that federally recognized Indian tribes occupy in the law. *See generally* Comment, "Recent Cases: Padilla v. Pueblo of Acoma," 102 *Harv. L. Rev.* 556 (1988) (criticizing the *Padilla* decision).

This Court has warned that Indian tribes "are not states, and the differences in the form and nature of their sovereignty make it treacherous" to reason too quickly by analogy. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). This admonition is particularly true with regard to tribal sovereign immunity. In *Blatchford*, the Court declared that

> [w]hat makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession [achieved by being parties to the Constitution]. There is no such mutuality with . . . Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.

501 U.S. at 782 (internal citation omitted).

The reasoning in *Nevada v. Hall* is based squarely on the principle that the States were able to protect and define their rights at the time of the Nation's founding. The Court presumed that the Framers assumed "that prevailing notions of comity would provide adequate protection against the unlikely prospect of an attempt by the

courts of one State to assert jurisdiction over another" and so "the need for constitutional protection against that contingency was not discussed." 440 U.S. at 419. The tribes were not at the Constitutional Convention. Moreover, to the extent Indian nations have surrendered control of their sovereignty, they surrendered it to the federal government, not the States. Just as a state may not decide to ignore the sovereign immunity of the federal government, it also may not abrogate a tribe's sovereign immunity without the consent of Congress or the tribe. Congress has not consented, the Tribes have not consented, and no consent can be found in the plan of the convention. The *Padilla* court's application of *Nevada v. Hall* to Indian tribes has no basis in law or history.

C. The Oklahoma Courts Have Confused Jurisdiction to Consider a Tribe's Sovereign Immunity Defense With the Power of the State to Dispense With That Immunity

Partly through its reliance on *Padilla*, the Oklahoma Supreme Court in *Hoover* dispensed with tribal sovereign immunity in off-reservation contract actions without referring to any of this Court's cases regarding tribal sovereign immunity cited above.

The *Hoover* court cited *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989), in support of its statement that "[i]t is settled that absent express federal law to the contrary, state courts have jurisdiction over the merits of a tribal immunity defense to claims arising under state laws." *Hoover*, 909 P.2d at 61. *Graham*, however, addressed only the applicability of the well-pleaded complaint rule to a tribe's sovereign immunity asserted as a defense. This Court held that, like most defenses based on federal law, tribal sovereign immunity asserted as a defense does not state a federal question and therefore would not confer removal jurisdiction on the federal district court. *Graham*, 489 U.S. at 842. That the state courts

retain jurisdiction over the the subject matter does not give them the authority to apply state law to, or disregard the federal defense of, sovereign immunity. Federal law remains supreme whether applied by a federal or a state court.

D. The Oklahoma Courts Have Confused Civil and Regulatory Jurisdiction Over Individual Indians With the Power to Set Aside the Immunity of the Tribe

The cases upon which the Oklahoma courts rely for the proposition that a state may enforce its non-discriminatory laws against Indians who engage in conduct outside of Indian country, namely *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), have held only that a state may have the authority to tax or regulate these activities. As *Citizen Band Potawatomi* makes clear, however, this authority does not include the right to sue the tribe directly to enforce such taxes or regulations absent a waiver. *See* 498 U.S. at 514. In fact, the Court stated both that "[t]here is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy" of suing the tribe directly, and that "we are not persuaded that it lacks any adequate alternatives." *Id.* at 514. The Court went on to offer a number of alternatives, including the final option of seeking "appropriate legislation from Congress." *Id.* This suggestion leads the states to the only non-tribal body that can alter or limit the immunity of the tribes: Congress. The courts of Oklahoma have no such power.

II. THIS COURT HAS LONG RECOGNIZED THE IMPORTANCE OF TRIBAL SOVEREIGN IMMUNITY

A. The Doctrine of Tribal Sovereign Immunity Is Well Settled

Early in this century, this Court formally recognized that Indian tribes enjoy the immunity from suit traditionally enjoyed by sovereigns. *See Turner v. United States*, 248, 354, 358 (1919). This formal recognition was in accord with much earlier decisions authored by Chief Justice Marshall. *See, e.g., Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (recognizing Indian tribes as "domestic dependent nations"); *Worcester v. Georgia*, 31 U.S. 515, 560 (1832), (observing that by associating with the stronger federal government, Indian tribes have not surrendered their sovereignty and independence). This doctrine remains a vital component of Indian law. *See United States v. Wheeler*, 435 U.S. 313, 323 (1975) (observing that "our cases recognize that the Indian tribes have not given up their full sovereignty"). "Indian tribes enjoy immunity because they are sovereigns predating the Constitution . . . and because immunity is thought necessary to promote the federal policies of tribal self-determination, economic development, and cultural autonomy." *American Indian Agric. Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (citing *United States Fidelity & Guar. Co.*, 309 U.S. at 512-13 (1940); *Turner*, 248 U.S. at 357-58; Felix S. Cohen, *Handbook on Federal Indian Law* 324-28 (1982 ed.); Note, "In Defense of Tribal Sovereign Immunity," 95 *Harv. L. Rev.* 1058, 1073 (1982)).

Tribal immunity is also consistent with early cases of this Court which held that under no circumstances would a state have the authority to interfere in the management of Indian affairs. *See, e.g., Worcester*, 31 U.S. at 560-61 (invalidating application of state law to territory held by Indian tribes). In fact, this Court recognized the explicit threat that state jurisdiction posed to the survival of

Indian tribes. *See United States v. Kagama,* 118 U.S. 375, 384 (1886) (observing that "[b]ecause of local ill feeling, the people of the State where [tribes] are found are often their deadliest enemies"). Rather than place Indian tribes at the mercy of the States, the Court upheld the reservation of plenary power over Indian affairs to the federal government. *See Worcester,* 31 U.S. at 561; *Kagama,* 118 U.S. at 384.

B. The Situs of the Events Giving Rise to a Suit Against a Tribe Has Not Affected and Should Not Affect the Application of Tribal Sovereign Immunity

In view of the established place of tribal sovereign immunity in federal law, there is no support for territorial limits on its reach. This Court has never conditioned tribal sovereign immunity from suit on the location of the events that give rise to the dispute. In fact, the Court has declined to draw such a distinction when urged. *See Puyallup Tribe, Inc.,* 433 U.S. at 167-68.

In *Puyallup Tribe, Inc.,* a tribe challenged a state court's assertion of jurisdiction to regulate the fishing activities of the tribe "both on and off the reservation." *Id.* at 167. The tribe advanced two separate, but related, arguments: (1) that the doctrine of sovereign immunity prevents a state court from entering a judgment directly against a tribe; and (2) that a state lacks the authority to regulate any fishing activities that occur within a reservation. *See id.* In concluding that the state did not have authority to regulate tribal activities, this Court declined to impute a territorial restriction to tribal sovereign immunity, but instead chose to distinguish between actions of a tribe, which are protected by sovereign immunity, and actions of individual tribal members, which may be subject to non-discriminatory state regulation even within a reservation. *See id.* at 167, 172-73 (finding claim of sovereign immunity advanced on behalf of the tribe "well founded" but concluding that it "does not

immunize individual members of the Tribe"). Stating conclusively that absent waiver or consent "a state court may not exercise jurisdiction over a recognized Indian tribe," this Court vacated those portions of the state court order that involved relief directly against the tribe. *Id.* at 172, 173.

Similarly, the Court has never concluded that tribal sovereign immunity fails to protect a tribe acting in a commercial capacity. *See Citizen Band Potawatomi,* 498 U.S. at 510. Nor has Congress chosen to prevent tribes from asserting sovereign immunity in connection with commercial activities, though it has shown the ability to craft such a limitation. *Cf.* 28 U.S.C. § 1605(b) (1994) (providing that foreign states shall not be immune in any case in which the action is based on a commercial activity).

C. Tribal Sovereign Immunity Protects Emerging Tribal Governments

The Court has recognized that at one point in the history of this country the principles underlying sovereign immunity were extremely important. *See Nevada,* 440 U.S. at 418. At a time when the infant state governments were struggling to establish themselves in the face of limited and uncertain revenues, they relied upon sovereign immunity to protect them from creditors and others who would raid the public fisc and threaten the very existence of emerging political and civic institutions. *See id.*

Although this "infant government" rationale may no longer apply to the complex multi-billion dollar state governments of contemporary America, it still holds particular relevance for those tribal governments across the country who are just beginning to emerge as viable political, economic, civic, and cultural entities. Because most tribes suffer from limited resources, dependency on the federal government, and modest tax bases, immunity from damage suits is tremendously important to their

continued development. *See* Comment, "Recent Cases: Padilla v. Pueblo of Acoma," 102 *Harv. L. Rev.* 556, 560 (1988). Among its other goals, tribal sovereign immunity "is intended to protect what assets the Indians still possess from loss through litigation . . . . If tribal assets could be dissipated by litigation, the efforts of the United States to provide the tribes with economic and political autonomy could be frustrated." *Cogo v. Central Council of the Tlingit and Haida Indians of Alaska,* 465 F.Supp. 1286, 1288 (D.Alaska 1979).

Experience with sovereign immunity at the state and federal levels demonstrates that governments reform their immunity doctrine only after achieving the economic strength sufficient to withstand significant legal and financial liability. The unfortunate circumstances that have followed the Oklahoma courts' decisions in the Kiowa cases acutely illustrate, by contrast, the current vulnerability of developing tribal governments. The results validate Congress' decision to retain tribal sovereign immunity as part of its overall policy of tribal self-determination. The instant case alone has resulted in judgments, including interest and fees, that total nearly $500,000. This is a significant burden for a tribe with an annual budget of less than $1,000,000.

Alarmingly, the Kiowa Tribe has actually been stripped of its tribal tax revenue and had its federal program funds frozen by garnishment. As a remedy in aid of execution, Kiowa has been enjoined from enforcing tribal tax laws in Indian country subject to its jurisdiction. Seizure by creditor's bill of Kiowa's oil and gas severance tax was recently upheld, along with the issuance of an injunction prohibiting Kiowa from enforcing its tribal tax lien law. *See "Aircraft Equipment Company v. Kiowa Tribe of Oklahoma,"* 68 *Okla. Bar Jour,* 1649 (May 10, 1997). The Tribe has been forced to defend against post-judgment garnishments that froze federally appropriated funds intended for various social programs under the Indian

Self-Determination and Education Assistance Act, 25 U.S.C. § 450(a) *et seq.* (1994), and various tribal governmental purposes under the Indian Tribal Judgment Funds Use and Distribution Act, 25 U.S.C. § 1401 *et seq.* (1994). *See Carl E. Gungoll Exploration Joint Venture v. Kiowa Tribe of Oklahoma,* No. CIV-96-2059-T (W.D. Okla. July 1, 1997); *Hoover v. Kiowa Tribe of Oklahoma,* No. CIV-96-1624 (W.D. Okla., filed Sept. 23, 1996).

Garnishment of federal funds disrupts the programs for which they were appropriated by Congress. Seizure of Kiowa's tribal tax revenues takes funds that would have been used to pay salaries of tribal government employees, maintain tribal real and personal property, fund education and job training programs, and supplement federal-tribal programs. The disruption of federal programs, the seizure of funds needed to run tribal government, and the injunction of enforcement of tribal law constitute serious intrusions by the state upon Kiowa's political integrity and upon Congress' pursuit of its "overriding goal" of encouraging tribal self-government.

D. Tribal Sovereign Immunity Advances the Federal Policies of Economic Development and Tribal Self-Determination

This Court has based its recognition of tribal sovereign immunity on two doctrines. First, because of the tribes' presence on this continent before the arrival of European settlers, "[t]hese Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit." *See United States Fidelity & Guaranty Co.,* 309 U.S. at 512. Second, the Court recognized that tribal sovereign immunity is necessary to protect tribal resources and thus to encourage economic development. *See id.* at 512 n.11 (citing *Adams v. Murphy,* 165 F. 304, 308-09 (8th Cir. 1908) (noting that, without immunity, "the tribes would soon be overwhelmed with civil litigation and judgments")). Indeed,

the Court has held that encouraging tribal self-government and economic development in Indian country is an "overriding goal" of Congress' policies toward Indian country. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 202 (1986).

Inherent in Congress' oversight of the welfare of Indian tribes is "the protection of the sovereignty of each tribal government." 25 U.S.C. § 3601(2) (1994). Congress has repeatedly affirmed this responsibility. Legislation passed by the 104th Congress expressly recognized that "the Constitution of the United States invests the Congress with plenary power over the field of Indian affairs, and through treaties, statutes, and historical relations with the tribes, the United States has undertaken a unique trust responsibility to protect and support Indian tribes and Indian people." Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 2(3), 110 Stat. 4017 (to be codified at 25 U.S.C. § 4101(3)).

In keeping with its role as trustee for the welfare of Indian tribes, Congress has actively advanced policies that strengthen tribal self-determination, cultural autonomy, and economic development. Recent examples of such efforts abound. *See* Indian Tribal Governmental Tax Status Act of 1982, 26 U.S.C. § 7871 *et seq.* (1994); Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701 *et seq.* (1994). The Indian Reorganization Act both empowered tribes to organize their own governance structures and provided measures authorizing tribes to engage in business. Ch. 576, 48 Stat. 984 (1934) (later codified at 25 U.S.C. §§ 461-479 (1994)). The Court remarked that the act permitted tribes to "assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974).

In light of recent opportunities for tribal economic activity outside of Indian country, the financial consequences of such litigation are potentially acute, especially

in cases where tribes have yet to achieve self-sufficiency and are thus left with little choice but to enter into economic relationships with non-Indians. Because the threat of financial loss can seriously dissuade tribes from engaging in economic activity, sovereign immunity reduces a tribe's exposure to risk and thus encourages economic development. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) (providing a general overview of congressional policies encouraging economic development).

Persistent suits against tribes in state and federal courts also interfere with tribal decision-making and thus constrain tribal self-determination. As the Court has emphasized, denying tribal immunity and allowing a state court to have jurisdiction over a tribe's commercial affairs "would undermine the authority of tribal courts and hence would infringe on the right of the Indians to govern themselves." *Williams v. Lee*, 358 U.S. 217, 223 (1959).

A number of courts have considered whether tribal sovereign immunity produces a chilling effect on commercial relations between tribes and non-Indian entities. *See, e.g., Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992) (considering plaintiff's contention that upholding tribal sovereign immunity will chill commercial relations between tribes and non-Indian banks). The Tenth Circuit, in particular, has criticized these claims for "precisely miss[ing] the point of sovereign immunity, which is the power of self-determination." *Id. See also Sac and Fox Nation v. Hanson*, 47 F.3d 1061, 1064 (10th Cir.), *cert. denied*, 116 S.Ct. 57 (1995). If tribal sovereign immunity does indeed chill commercial relations for tribes, then tribes can freely decide whether to continue to rely on the doctrine. Courts should not presume, however, to second-guess the wisdom of tribal decisions, which include evaluation of the costs and benefits of retaining their sovereign immunity.

Almost all tribes must turn to trade and economic relationships with non-tribal parties in order to achieve meaningful economic development. As a result, tribes themselves have a positive incentive to create a development climate that is amenable to non-Indian parties. At the same time, because tribes are faced with this commercial necessity, tribal sovereign immunity, with its concomitant guarantee against costly litigation, plays an important role in their economic decision-making. Recent testimony before the Senate Committee on Indian Affairs succinctly underscores the critical importance of sovereignty to the welfare of Indian country:

> If we look back on the history of federal Indian policy in the Twentieth Century, it is not a coincidence that it has only been in the era of self-determination that a significant number of reservations have begun to break the cycle of poverty and dependence. Sovereignty is one of the primary development resources tribes can have, and the reinforcement of tribal sovereignty under self-determination should be the central thrust of public policy. One of the quickest ways to bring development to a halt and prolong the impoverished conditions of reservations would be to further undermine the sovereignty of Indian tribes.

Economic Development on Reservations: Hearing Before the Senate Committee on Indian Affairs, 104th Cong. (Sept. 17, 1996) (statement of Prof. Joseph Kalt).

The Kiowa provide a telling example of the problems faced by tribes attempting to develop a sustainable commercial base. The Tribe does not have a reservation in the usual sense of having a significant block of contiguous land set aside for its use. Instead, the Tribe holds small, scattered parcels that total about 1,200 acres, along with some interest in about 3,000 acres held in trust for it and two other tribes. The lack of a reservation is not unique to the Kiowa among Oklahoma Indian tribes. For a number of years, Congress pursued a policy of allotting Indian

reservation land to tribal members and opening any "excess" land to settlement. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* (1982 ed.) (providing a history of the allotment era). The congressional allotment policy left all Oklahoma tribes with significantly reduced land bases and the unique restrictions associated with a reduced land base. *See id.* at 770-96.

Furthermore, should non-tribal entities be concerned with the consequences of tribes retaining their constitutionally accorded sovereign immunity, they are in no way impaired from offering tribes compensating contractual provisions in exchange for waivers of immunity. In response to such concerns, it is common practice for tribes to agree to waive their sovereign immunity in economic relationships with off-reservation entities. *See McClendon v. United States*, 885 F.2d 627, 631 (9th Cir. 1989) (observing that people dealing with tribes typically address sovereign immunity through negotiation); *American Indian Agric. Credit Consortium, Inc.*, 780 F.2d at 1379 (commenting that "[t]ribes and people dealing with them long have known how to waive sovereign immunity when they so wish"); *Tribal Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 104th Cong. (Sept. 24, 1996) (hearing testimony from Indian law practitioners that "[v]irtually every commercial transaction entered into on an Indian reservation today has a sovereign immunity waiver in there"). Because waiver of tribal sovereign immunity is a contractual provision over which parties may negotiate, those non-tribal parties that consent to contracts in which tribes retain their sovereign immunity knowingly set the terms of their own contracts, and their agreements reflect countervailing benefits in other contractual provisions. Because tribal immunity was in the instant case an explicit contractual term over which consenting parties were free to bargain without coercion, the paternalistic intervention of the courts is both inappropriate and unnecessary.

E. In Accordance With Its Plenary Power Over Indian Affairs, Congress Is the Appropriate Forum for Defining the Extent of Tribal Sovereign Immunity

The decision of the Oklahoma Court of Appeals and the earlier decisions on which it is based subvert the plenary power of Congress over Indian affairs, including the scope of tribal sovereign immunity. Congress is well aware of its power to limit that immunity. It has considered but has chosen not to effect a wholesale abrogation of tribal sovereign immunity. The Constitution leaves that choice to Congress, not to the courts of Oklahoma.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the Oklahoma Court of Appeals be reversed.

Respectfully submitted,

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